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2008
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SUPREME COURT, U.S.

No. 07-1060

IN THE

Supreme Court of the United States

SAMUEL H. TAKA & SYLVIA A. TAKA d/b/a S. TAKA and ALBERT ISA d/b/a ALBERT ISA NURSERY,
Petitioners,

v.

E.I. DU PONT DE NEMOURS & COMPANY; ALLEN TESHIMA; and REGINALD HASEGAWA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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I. INTRODUCTION

Petitioners Samuel Taka and Sylvia A. Taka, d/b/a S. Taka and Albert Isa d/b/a Albert Isa Nursery ("Petitioners") respond to the Answering Brief submitted by Respondent, E. I. du Pont de Nemours and Company ("DuPont").

In its Answering Brief, DuPont contends that Petitioners waived their federal due process arguments, i.e. by failing to raise them in the underlying state court proceedings. Ans. Brief at pp. 11 - 12. It also contends that the Hawaii Supreme Court's November 21, 2007 Decision was simply a construction of Hawaii law rendered by the State's highest appellate court, and (thus) does not present an appropriate issue for review under the federal constitution. Id. at pp. 12 - 13. Lastly, it argues that Petitioners waived their right to present requisite expert evidence during the summary judgment proceedings in the Circuit Court, and should not be relieved of the "calculated . . . free . . . choice," they made, but should be bound by their "election." Id. at pp. 14 - 16.

These points are addressed respectively below.

II. PETITIONERS' REBUTTAL

A. This Court Clearly Has Authority to Permit Review and Should do so to Remedy a Violation of Petitioners' Due Process Rights

DuPont initially contends that Petitioners' due process arguments should be rejected since Petitioners did not raise them in the courts below; the theory being that such failure is either a "jurisdictional," or "jurisprudential" limitation on the United States Supreme Court's power of certiorari. Ans. Brief at pp. 11 - 12. This is neither conclusive nor persuasive; it has never been suggested that all arguments on behalf of, or in opposition to a federal claim must be raised or decided at the state court level to merit review. See Illinois v. Gates, Et. Ux., 462 U.S. 213; 103 S. Ct. 2317; 76 L. Ed. 2d 527; (1983) (concurring opinion of Justice White); R. Stern & E. Gressman, Supreme Court Practice 230 (5th ed. 1978). Indeed, in the past, this Court has continually entertained review of state court decisions in spite of such absence; see Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed. 2d 1 (1982); Vachon v. New Hampshire, 414 U.S. 478, 94 S. Ct. 664; 38 L. Ed. 2d 666 (1974); Terminello v. Chicago, 337 U.S. 1; 69 S. Ct. 894; 93 L. Ed. 1131 (1949). The result has been rationalized on the grounds of "plain error;" see Vachon, supra. It has also accomplished by adopting a "method of analysis" likewise "readily available to the state court." Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed 2d 551 (1972).

> If the [federal] question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.

Dewey v. Des Moines, 173 U.S. 193, 19 S. Ct. 379, 43 L.Ed 665 (1899) (emphasis added).

That said, DuPont's argument that the November 21, 2007 Decision should be left untouched as an exclusive question of State law, is easily disposed of. Contrary to DuPont's statements,[1] Petitioners have never suggested that the issue here, is whether the Hawaii courts were reposed with sufficient authority to change Hawaii's remedy for a fraudulently induced settlement; they obviously do. The thrust of Petitioners' claim is that the manner in which this change was accomplished violated procedural due process under the federal constitution – a point which DuPont studiously avoids by misdirection.

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[1] Ans. Brief at pp. 13 - 14.

It bears repeating that the Hawaii courts effected this change after the fact, and without any advance warning to Petitioners; DuPont itself does not dispute that this occurred. And the Hawaii Supreme Court rejected Petitioners' request to return to the circuit court to address the impact of the new law after it was affirmed. Such action clearly served to deprive Petitioners of their "guarantees" to a "fair decision making process" before "official action" was taken to divest them of their property rights.

Had the Hawaii Supreme Court granted Petitioners' request, and if Petitioners had then failed to supply the requisite evidence in conformity with the new law, there would scarcely be room for complaint. In such event, Petitioners would simply have lost summary judgment due to a lack of appropriate proof. Plainly, however, Petitioner had absolutely no such opportunity: they were initially apprised of the change and accompanying evidentiary requirements after it was already too late to satisfy these prerequisites (see below).

Petitioners submit that adequate notice, and a true opportunity to be heard require far more than the procedures provided here. Procedural due process demands that parties be given advance warning and occasion to fairly meet the legal standards set forth by the local forum. Petitioners were denied that right, and as a result, this Court should now grant review.

B. Petitioners Did Not, and Indeed Could Not Have Waived Their Right to Present the Expert Evidence Required by the Circuit Court and the Hawaii Supreme Court

DuPont argues that Petitioners waived their right to present expert evidence on the standard of damages adopted by the circuit court, and subsequently affirmed by the Hawaii Supreme Court. But this argument finds no support in the record; indeed, the converse is actually the case. Petitioners were deprived of any ability to provide such indicia since the circuit court foreclosed all opportunity months beforehand as part of its prior rulings.

It is undisputed that nine months before the circuit court decided which standard was to be applied, it ordered petitioners to submit final expert reports delineating their theory of damages. App. A126 - A127. As part of its order, it specifically held that these experts would not be permitted to "testify on any matters beyond their respective reports." Id. The court did not require that "the experts produce a settlement value, a judgment value, any other specific dollar amount related to damages, or that the experts set forth [compromise] factors according to a particular standard by which damages must be measured." App. A93. All such requirements were adopted after the fact, and after Petitioners' finalized expert reports had been ineluctably submitted in opposition to summary

judgment. Id. How, then, can it fairly be said that Petitioners "waived" their right to produce the necessary evidence? By definition, waiver requires a voluntary and consciously intentional relinquishment of a known right – and in this instance, Petitioners' purported forbearance was neither intentional, nor voluntary, and in fact, was not a relinquishment.

Nor can it be said that a waiver was effected by the Petitioners' failure to timely request a Rule 56(f) continuance. Ans. Brief at pp. 8 - 9. The circuit court itself noted in its summary judgment ruling that it would have denied all supplementation; therefore, a request for this purpose would have been wholly meaningless. To now say that Petitioners should be faulted for not doing so is to penalize them for relying on the court's stated directives, and mandates. Again, how is this appropriate?

Petitioners respectfully confess that they are unfamiliar with the form of "waiver" now espoused by DuPont. Presuming parties are to be strapped with the consequences of their "waiver," they should, at the very least, be apprised in advance of what they are waiving. Clearly, that did not happen here. As affirmed by the Hawaii Supreme Court, the circuit court literally skewed the "rules of the game," without warning, and in the total absence of Petitioners' opportunity to fairly meet the court's prerequisites. Such action deprived

Petitioners of their procedural due process rights under the United States Constitution – and accordingly, this Court should now grant review.

III. CONCLUSION

Based on the foregoing points and authorities, Petitioners Samuel Taka and Sylvia A. Taka, d/b/a S. Taka and Albert Isa d/b/a Albert Isa Nursery respectfully request DuPont's opposition should be rejected, and that a Writ of Certiorari should issued.

Dated: March 26, 2008
Honolulu, Hawaii

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